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DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875.

PART III.[1]

BEFORE leaving the subject of discovery in the Court of Chancery, it is proper to call attention to certain changes in the procedure of that court introduced by the statute of 15 and 16 Vict., c. 86. That statute, which came into operation Nov. 2, 1852, was passed in consequence of, and pursuant to, the recommendations of a Royal Commission, appointed Dec. 11, 1850, to inquire into and report upon the process, practice, and system of pleading in the Court of Chancery, with a view to ascertaining whether any and what alterations and amendments could be made therein which would be conducive to the better administration of justice.

Equity Pleading was, therefore, one of the three subjects with which the commissioners were called upon to deal, and it presented a more inviting field for the exercise of their talents than either of the others; for alterations and amendments in the other two were called for chiefly with a view to making the administration of justice cheaper and more speedy, while they were called for in the system of pleading for the purpose of making it better. Nor could the commissioners have been in doubt as to the nature and extent of the alterations and amendments needed in the system of

[1] Continued from page 219 of vol. xi.

pleading, if they would have opened their eyes to the fact that that system was not indigenous to the Court of Chancery, and, therefore, that the standard by which it was to be judged must be sought elsewhere than in that court; for then they could not have failed to see that, while the Court of Chancery was entitled to little credit for the virtues of that system, it was responsible for all or nearly all its vices, and hence that the way to improve it was to make it conform more closely to its prototype.

In the civil and canon law, as has been seen,[1] discovery, while of course it was intimately connected with the pleadings, was nevertheless separated from and independent of them. When the plaintiff in a suit had filed his first pleading, if he wanted discovery from the defendant to aid him in proving it, he filed positions, — which the defendant was required to answer upon oath. If he did not want discovery, he filed no positions, and then there was nothing for the defendant to answer. Meantime the defendant had to consider whether he would set up an affirmative defence. If he decided to do so, he filed a pleading, and then the same questions arose upon that, *mutatis mutandis*, as upon the plaintiff's first pleading; and this process went on until each had pleaded all the facts that he had to plead. If the defendant decided to set up no affirmative defence, he filed no pleading, and so of course the pleadings ended with the plaintiff's first pleadings; and in whatever stage of the series the pleadings ended, they ended because the party whose turn it was to plead did not avail himself of his opportunity.

It will be seen, therefore, that while the filing of pleadings was a right, and had in it no element of duty, the giving of discovery was a duty, and had in it no element of right. Indeed, the giving of discovery was not even a duty which could be voluntarily performed, for a party could not answer by way of discovery unless positions were filed for him to answer; and it seems that this was also true in the English ecclesiastical courts, notwithstanding the fact that in those courts the positions were always incorporated with the pleadings; [2] for, though the consequence was that the pleadings themselves had to be answered by way of discovery, yet this was done only pursuant to an order of the court, and of course such an order would be made only upon the application of the party whose pleading was to be answered.

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[1] See vol. xi. 143-4.

[2] See vol. xi. 144.

In the Court of Chancery, however, the capital mistake was made from the beginning of uniting discovery indissolubly with the pleadings. The only means by which discovery could ever be obtained in that court was by filing a bill (and thus making one's self plaintiff in a suit) against the person from whom discovery was sought, and thereupon procuring a writ of *subpœna*, and serving it upon the latter, who thus became the defendant in the suit. By the *subpœna* the defendant was required, first, to appear to the bill; secondly, to answer the same (*i. e.*, by way of discovery). Moreover, it was in this way alone that any suit in chancery could be commenced, whatever might be its object, *i. e.*, whether discovery was its sole object, or whether its ultimate object was relief, — to which discovery was thus made an indispensable preliminary; and the reason was that the writ of *subpœna*, under the Great Seal, was the plaintiff's only means of coercing a defendant; and yet, not only was the tenor of that writ fixed and unchangeable, so that a plaintiff could have no option as to what it should require of the defendant, but a plaintiff could not even waive any of its requirements. The result, therefore, was that there could be no discovery without a suit, and no suit without discovery; that discovery was always the second thing required of the defendant, and that nothing else could be had of him until that was obtained. A consequence was that, so long as a defendant could avoid giving discovery, whether by going beyond the jurisdiction, or by keeping himself concealed within the jurisdiction, or even by lying in prison, he could hold the plaintiff completely at bay; or rather he could have done so but for the adoption of certain expedients for the plaintiff's relief, which will be mentioned presently.

Another consequence (which, however, has attracted much more attention in this country than in England) was that a plaintiff, whose only evidence in support of his case (with the exception of such admissions as he might obtain from the defendant by way of discovery) was the testimony of a single unimpeachable witness, could not possibly obtain relief in equity, if any fact necessary to support his claim was positively denied by the defendant's answer. This was because of a rule of evidence borrowed by the Court of Chancery from the canon law, namely, that no fact positively denied by a defendant under oath could be proved against him by the testimony of a single witness, — a rule which derived its sole support from the assumption that the defendant was put upon his oath by the voluntary act of the plaintiff. It seems, more-

over, that the union of discovery with the pleadings was responsible for all the potency, if not for the very existence, of that rule in the Court of Chancery; for, in consequence of that union, a defendant's answer by way of discovery, being a part of the pleadings, was always before the court, though it had not been read in evidence; and, therefore, though a defendant could never read his answer in evidence, yet he could point out the fact that certain allegations in the bill were positively denied by his answer, for the purpose of showing that such allegations could not be proved by the testimony of a single witness. If, however, the answer by way of discovery had not been a part of the pleadings, it would not have been before the court at all unless the plaintiff chose to read it in evidence, and hence the plaintiff could have required an answer by way of discovery in all cases, without incurring any risk of being injured by it, as it would have been at his option, up to the very last moment, whether or not it should be used for any purpose.

Turning now to the case of a defendant, we find that no provision whatever was made for his pleading an affirmative defence, that the answer of a defendant in theory comprised nothing but his examination under oath, by one of the masters of the court, upon the statements, charges, and interrogatories contained in the bill, and yet that it was only by incorporating with his examination by way of discovery any affirmative defence that he might have, that a defendant could avail himself of such defence at all; and hence that the union of pleading and discovery was quite as indissoluble in respect to a defendant as it was in respect to a plaintiff. One consequence was that a defendant always had to swear to the truth of his defence, while a plaintiff was not required to swear to the truth of the case stated in his bill, — an inequality for which there was no justification. Moreover, it is wrong in itself to require a party to swear to the truth of his pleadings, and parties have never been intentionally required to do so in England unless in very exceptional cases. A party may have a perfectly good case or defence, and yet have no personal knowledge whatever of the facts which constitute it, nor even what a conscientious person would regard as any grounds for belief in regard to them. In the case of executors and administrators in particular, this is a matter of daily experience. Least of all should a party be required to swear to his pleadings in a court which, like the Court of Chancery, boasted pre-eminence in giving discovery, and which yet gave it

only to aid a party in *proving* his case or defence, — not to aid him in *stating* it. In the Court of Chancery, *e. g.*, it often happened that a party's chief or sole reliance for proof was upon admissions to be extorted from his adversary; and in every such case, as the pleadings may be only an experiment, there should be great facility of amendment, as there always was in case of a bill; and yet any amendment of a sworn answer in chancery was attended with great difficulty.[1]

An incidental consequence to plaintiffs of the indissoluble union of answers by way of defence with answers by way of discovery was, that a defendant could never lose by default the right to set up a defence; that the only default in not answering was in not answering by way of discovery, and the consequence of that default was, not that the defendant lost the right of answering, but that he became liable to process of contempt to compel him to answer. A defendant, therefore, could never lose any right by delaying the putting in of his answer, provided he answered eventually; for, whenever he chose to answer by way of discovery, he had a right, of which the court had no power to deprive him, to answer also by way of defence.

The greatest mischief, however, which was worked by the union of pleading and discovery in the Court of Chancery was to the pleadings themselves, though this was much greater in the case of the answer than it was in the case of the bill. The only additions that ever had to be made to a bill for the sake of discovery were charges and interrogatories, and neither of these interfered seriously with the character of the bill as a pleading. The charges were mere amplifications of the stating part of the bill, *i. e.*, while the latter stated facts, the former stated evidence of those facts; and the interrogatories of course showed on their face what they were, and they could not possibly be mistaken for anything else. With the answer, however, it was far otherwise, for the two elements which that contained were as different from each other as two things could well be, and yet neither of them had any mark by

[1] See 1 Dan. Ch. Pr. (5th ed.) 679–684. "In proceedings upon oath, where there is a clear mistake, an answer has by leave of the court been taken off the file, and a new answer put on it; but Lord Thurlow adopted a better course, not taking the answer off the file, but permitting a sort of supplemental answer to be filed, that course leaving the parties the effect of what had been sworn before, with the explanation given by the supplemental answer." Per Lord Eldon, in Dolder *v.* Bank of England, 10 Ves. 285. "The former practice was to allow the answer to be amended, but now the course is to put in a supplemental answer." Per Lord Eldon in Wells *v.* Wood, 10 Ves. 401.

which it could be distinguished from the other with any certainty; and, therefore, their union in one document was the cause of infinite confusion.[1] Moreover, this was an evil which time had no tendency to cure, or even to mitigate; for it was an evil which affected the whole body of suitors, and from which no individual often consciously suffered, and, therefore, it failed to attract the attention of the public. When a plaintiff found it impossible to compel a defendant to answer, and there was a total failure of justice in consequence, the evil was one which could not long be passively endured; and even the necessity of incurring the expense and delay of obtaining an answer, signed and sworn to, from every defendant to a suit in equity (however distant or inaccessible he might be, and though an answer from him by way of discovery could be of no value to the plaintiff, either because no relief was sought against him, and he was made a defendant merely in order that he might be bound by the decree, or because he had no knowledge of the facts of the case), was an evil which was sure to be felt by individual suitors, and was, therefore, likely to excite loud complaints. Accordingly, we find that several expedients were adopted, from time to time, with a view to making it possible to prosecute a suit without any answer at all from a defendant, or without an answer signed and sworn to; but all these expedients were designed merely to meet the particular evil which was felt, and they left the general evils resulting from the unnatural union of discovery and defence untouched and unnoticed.

Thus, with the plaintiff's consent, the court would make an order that the defendant be permitted to file his answer without oath, or even without oath or signature (*i. e.*, that the defendant's solicitor be permitted to file it, without the necessity of communicating with his client). This expedient, of course, was applicable only to friendly suits, as it required the co-operation of both parties. Moreover, an answer was still necessary, notwithstanding such an order, and it still contained, in theory, discovery as well as defence.

[1] For example, it has not been generally perceived that the denials contained in answers are merely by way of discovery, and hence the truth that bills and answers, regarded as pleadings, are wholly affirmative, has not met with general acceptance; and yet the fact that a defendant may be compelled to admit expressly in his answer whatever he cannot deny under oath, and that whatever the defendant does not expressly admit the plaintiff must prove, ought to have reminded any one who needed such a reminder that there are no constructive admissions in equity, and hence that there would be no occasion for any denials in an answer, were it not that the defendant is compelled either to admit or deny by way of discovery.

Again, when a plaintiff had exhausted all the processes of contempt, and still was unable to compel the defendant to answer, the court would, by way of punishing the defendant for his contumacy (*in pœnam contumaciæ*), direct that the bill be taken *pro confesso*, *i. e.*, that the defendant be treated as admitting to be true all the allegations in the bill which were necessary to enable the plaintiff to obtain a decree, and accordingly that the same decree be made against him that would have been made if he had filed an answer actually admitting them to be true. This was undoubtedly a very strong measure, but the court had the authority of the canon law to fall back upon, and it also had a much stronger reason for adopting the measure than the canon law had; for in the latter the only evil suffered by the plaintiff from the defendant's neglect or refusal to answer was the loss of the discovery to which he was entitled, while, in the Court of Chancery, he lost the right to prosecute his suit. At the same time it was a measure which, on account of the delay and expense which it involved, failed to meet the requirements of justice in all that class of cases in which the right to prosecute his suit, and not discovery, was what the plaintiff demanded; and accordingly, with the aid of the legislature, other expedients were adopted during the second quarter of the present century to meet the needs of the class of cases just mentioned. Thus, in 1830, it was provided by statute[1] that if a defendant, on being brought to the bar of the court to answer his contempt in not answering the bill, still refused to answer, the plaintiff might, instead of having the bill taken *pro confesso*, put in an answer in the defendant's name, stating that the defendant left the plaintiff to make such proof as he should be able or be advised to make, and submitting his interest to the court. What strikes one most strongly in this provision is the misplaced tenderness with which it treats the defendant; for not only is it confined to cases in which the defendant is actually before the court, and yet continues to persist in his contempt, but the defendant is given twenty-one days' further time to answer, and even at the expiration of that time the plaintiff is permitted to put in an answer for the defendant only with the leave of the court, to be obtained on ten days' notice to the defendant, in case no good cause be shown to the contrary; and yet, when all is done, the only boon conferred upon the plaintiff is that of being permitted to prosecute his suit, and

[1] 11 Geo. IV. and 1 Wm. IV., c. 36, s. 15, Rule 11.

the only evil inflicted upon the defendant is that of not being permitted longer to obstruct the course of justice.

While the relief thus afforded was better than nothing, it fell very far short of what was required, even to remove the particular evil which plaintiffs suffered from being unable to get their causes at issue, *i. e.*, in a condition in which they could take their testimony.

Eleven years later, a much more effective remedy for this evil was provided by the General Orders of Aug. 26, 1841,[1] having the force of statutes;[2] for it was declared that, as soon as any defendant incurred the penalties of contempt in not answering the bill, the plaintiff might file a note stating that he intended to proceed with his cause as if the defendant had filed an answer, traversing the case made by the bill, and the plaintiff had replied thereto, and served a *subpœna* to rejoin; and that, such note having been filed, the service of a copy of it upon the defendant should have the same effect as the service of a *subpœna* to rejoin, namely, that of putting the cause completely at issue, and so enabling the parties to proceed to the taking of testimony. The plaintiff was, indeed, required to obtain leave of the court before filing such note; but he was permitted to obtain leave without notice to the defendant, and upon proof that the defendant had incurred the penalties of contempt in not answering. Moreover, the necessity of obtaining leave of court was put an end to the following year.[3]

The note which was thus permitted to perform the threefold function of an answer, a replication, and a *subpœna* to rejoin, acquired

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[1] Orders 21 and 22. See Cr. & Ph. 373–4.

[2] The General Orders of Aug. 26, 1841, were made under the authority conferred upon the Court of Chancery by 3 & 4 Vict., c. 94 (amended by 4 & 5 Vict., c. 52), which recited that it would greatly contribute to the diminishing of expense and delay in suits in the Court of Chancery if the process, pleadings, and course of proceeding therein were in some respects altered, but that this could not be conveniently done otherwise than by Rules or Orders of the judges of the said court from time to time to be made, and that doubts might arise as to the power of the said judges to make such alterations as might be expedient without the authority of Parliament; and accordingly sect. 1 authorized the Lord Chancellor, with the advice and consent of the Master of the Rolls, and the Vice-Chancellor, or one of them, by rules and orders to make such alterations; and declared that such rules and orders should (subject to certain conditions which need not be stated) be binding and obligatory on the said court, and be of like force and effect as if the provisions contained therein had been expressly enacted by Parliament. This statute initiated a policy which has exerted a momentous influence, for it resulted, thirty-five years later, in the legislature's giving to the courts, as organized by the Judicature Acts, the entire practical control over their own procedure.

[3] Namely, by Order 5 of April 11, 1842. See 1 Ph. xv.

the name of "traversing note";[1] it was further regulated by the General Orders of May 8, 1845,[2] and continued to be a feature of the practice of the court until it was superseded by the Judicature Acts. It must have been a great boon to all those plaintiffs who could not obtain an answer without resorting to the processes of contempt, and who yet did not care enough, either for discovery or for having the bill taken *pro confesso*, to make it worth their while to incur the expense and delay which each involved. And yet it seems odd that it should not have occurred to the authors of the "traversing note" that there must be some very radical vice in a system which required a remedy so circuitous and so artificial for a phenomenon so ordinary as that of a defendant's failing to "plead"; or, if it did occur to them, that, having been clothed by the legislature with ample powers for the purpose, they should not have attempted to discover and cure the vice itself, instead of contenting themselves with dealing merely with one of its manifestations.

It often happened in the Court of Chancery that persons against whom the plaintiff sought no relief, but who might claim that they, and not the plaintiff, were entitled to the relief claimed by the plaintiff, or to some part of it, were required by the court to be made defendants for the protection of the principal defendant, *i. e.*, in order that they might be bound by any decree which the plaintiff might obtain against him. In many of the cases in which such persons were made defendants, they had no thought of concerning themselves with the litigation, and there was, therefore, no good reason why they should even appear to the bill, much less answer it. Accordingly, it was provided by the orders of Aug. 26, 1841,[3] that such defendants need not be served with a *subpœna*, but might instead be served with a copy of the bill, omitting the interrogating part, — in which case the bill, as against such defendants, should not pray for a *subpœna*, but should pray that such defendants might be bound by all the proceedings in the cause; that if such defendants, being so served with a copy of the bill, did not appear thereto,

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[1] It is hard to say whether equity lawyers or common-law lawyers ought to have been most bewildered by this name and the language of the orders which suggested it, — the former, at finding one of the most technical terms of common-law pleading suddenly introduced into the nomenclature of equity procedure; the latter, at finding the defendant's failure to answer treated as a reason why he should be regarded as having denied the plaintiff's case, instead of a reason why he should be regarded as having admitted it.

[2] Orders 52–58. See 1 Ph. lxxxviii–xc.

[3] Orders 23–29. See Cr. & Ph. 374–7.

the plaintiff might proceed as if they were not parties to the suit, and yet they should be bound by all the proceedings therein; that if they did appear or took any other action in the suit, it should be at their own expense, unless the court should otherwise order; and that any plaintiff who did not avail himself of the foregoing provisions, but prosecuted his suit against such defendants in the ordinary way, should pay all the costs thus occasioned, unless the court should otherwise direct. It will be seen, therefore, that while these provisions, like those previously referred to, were designed to enable plaintiffs to prosecute suits without any answers, or even appearances, from a certain class of defendants, yet that the motive of their authors was not to save plaintiffs from the necessity of obtaining answers from unwilling defendants, but to remove from plaintiffs and defendants alike, in a class of cases in which the costs of all parties were often paid out of an estate or fund which the court was administering, a temptation to incur needless expense. Still, though the evil in this class of cases was different from what it was in those previously referred to, yet it had its root in the same cause; for the reason why a defendant against whom no relief was prayed was always entitled to his costs of appearing and answering, was, that, through no fault of his, he was compelled to appear and answer for the benefit of others, and therefore he was of course entitled to be indemnified for doing so.

The reader will not have failed to remark that, in all the foregoing expedients, the object was to devise means of dispensing, in certain cases, with any answer at all, whether by way of discovery or defence, or with any answer under the oath or even under the signature of the defendant, and that no attempt was made to separate answers by way of discovery from answers by way of defence. The cases, moreover, in which answers could be dispensed with were exceptions, and of comparatively rare occurrence, the rule being that a defendant answered, unless, indeed, he demurred or pleaded. In the cases, therefore, which constituted the rule, there was no change, and hence the evils arising from the inseparability of pleading and discovery had received no mitigation. It seems clear, therefore, that the alteration and amendment in equity pleading which was most imperatively demanded was the removal of those evils, root and branch, by the removal of their cause.

How, then, could the separation of discovery from pleading in the Court of Chancery have been best brought about? In other

words, how could the separation have been made with the least change in other respects, and consequently with the least disturbance and friction? These questions will be best answered by suggesting one or two considerations affecting bills.

It has been seen[1] that a bill in equity, like the pleadings in the ecclesiastical courts, always in theory contained within itself, under the name of charges of evidence, the positions of the civil and canon law, and that discovery in the Court of Chancery, so far as it was of matters within the defendant's personal knowledge, consisted in theory wholly of the answers of the defendant, under oath, to the allegations and charges in the bill. In truth, however, the Court of Chancery never succeeded in naturalizing this foreign mode of extracting discovery. From an early period draughtsmen insisted upon inserting interrogatories also for the defendant to answer, and, though these at first received no recognition from the court, yet they constantly gained ground, while charges of evidence lost ground, until at length it was practically the interrogatories, and not the allegations and charges, that the defendant answered. It is true that every interrogatory had to be founded upon an allegation or charge, but that came to be regarded as a merely technical or arbitrary rule, only the letter of which need be complied with; and, therefore, it was held that an allegation or charge might be materially amplified by an interrogatory.[2] Hence it became a rule that, while every allegation and charge must be fully answered, every interrogatory, if properly supported by an allegation or charge, must also be fully answered. Moreover, as every bill contained interrogatories, and as the interrogatories always covered all the ground covered by the allegations and charges, and additional ground also, the first part of the above rule became practically inoperative, while the last part was always vital. For example, when an answer was excepted to for insufficiency, the part of the bill which was claimed not to be fully answered was generally, if not always, the interrogating part or some portion of it, — not the stating part or charging part. Lastly, it was provided by the general orders of Aug. 26, 1841,[3] that a defendant should not be bound to answer any statement or charge in a bill unless specially and particularly interrogated thereto; that the interrogatories should also be divided from each other and numbered consecutively; and that the inter-

[1] See vol. xi. 208.

[2] *Ibid.*, note.

[3] Orders 16 and 17. See Cr. & Ph. 371–2.

rogatories which each defendant was required to answer should be specified in a note at the foot of the bill, and that no others need be answered; and the effect of this was held to be that a defendant who was not thus required to answer some specified interrogatory or interrogatories, need not answer the bill at all.[1] Only two more steps were necessary, therefore, in order to separate discovery entirely from the bill and to make it optional with the plaintiff whether the defendant should answer by way of discovery or not, — namely, first, to separate the interrogatories from the bill; secondly, to declare that a defendant's answers by way of discovery should be in law, as they were in fact, answers to the interrogatories, — not an answer to the bill. Moreover, these two steps were necessary to complete and round out what had been already done, and there is, therefore, no doubt whatever that they ought to have been taken, assuming that it was desirable to separate discovery from the pleadings; and that, too, quite aside from the question whether interrogatories or positions constitute the better instrument for eliciting discovery, for it was quite too late to change from the former to the latter in the Court of Chancery.

How, then, about separating the defendant's answer by way of discovery from his answer by way of defence? That object would also be already accomplished; for if interrogatories were filed by the plaintiff, the defendant would have to answer them by way of discovery; if none were filed, no discovery would be given; and in either case the *bill* would remain unanswered. If the defendant wished to set up an affirmative defence, of course he would answer the bill by way of defence; otherwise he would have no occasion to answer it at all, and the pleadings would end with the bill.

What incidental effects, if any, would the separation of discovery from the pleadings have had upon the latter? Upon the bill, it would have had the incidental effect of putting an end to all charges of evidence for the purpose of discovery; upon the answer, it would have had the incidental effect of making it unnecessary for the defendant to swear to it; upon pleas and demurrers, it would have had the incidental effect of abolishing them entirely. If the reader is surprised at this last statement, he is requested to bear in mind that pleas and demurrers had only one direct object, namely, that of protecting the defendant from answering by way of discovery. Hence it was that the only effect of allowing a plea

[1] Hughes *v.* Lipscombe, 3 Hare, 341, overruling Wilson *v.* Jones, 12 Sim. 361.

or demurrer was to make it impossible for the plaintiff to compel an answer, and, therefore, impossible for him to proceed with his suit, unless he could get rid of the plea or demurrer by amending his bill. Hence it was that the only effect of overruling a plea or demurrer was that the latter went for nothing, and the defendant was in the same situation as if he had not filed it, *i. e.*, he had to answer. Hence, also, it was that a bill was the only pleading to which a plea or demurrer would lie, that being the only pleading which had to be answered by way of discovery.

Would the abolition of pleas and demurrers have been objectionable? Certainly the abolition of pleas would not, for (to the discredit of the judges who had administered them be it said) they had proved a signal failure,[1] and it was too late to attempt to reconstruct them. Whether some other means should be devised for affording that protection to defendants against giving discovery which pleas were designed to afford, would have been an independent question. With demurrers the case was somewhat different; for they served reasonably well the purpose for which they were designed, and they also served the useful indirect purpose of raising the question whether the bill stated a good case, assuming it to be true. But, then, both of these objects could have been accomplished in some other way (as they were in the civil and canon law), *e. g.*, by a motion to take the bill off the file; and this would have had the incidental advantage of being equally applicable to the answer, *i. e.*, the defence.

In what condition, then, would the pleadings as a whole have been left? Subject to two qualifications, they would have become just what the pleadings in the civil and canon law were; namely, a series of affirmative pleadings on each side, continuing until the facts of the case were exhausted. One of the qualifications which must be made to this statement is, as has been already seen,[2] that the bill would have contained the entire series of the plaintiff's pleadings, as the answer would of the defendant's. The other qualification requires some explanation.

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[1] "For the form of a very elaborate and difficult plea, one of the few pleas in the history of pleading that have escaped being overruled, see Appendix, 146." Drewry on Equity Pleading, 68. The form referred to is the plea in Saunders *v.* Druce, 3 Drewry, 140. While it is true that that plea escaped being overruled by the judge of first instance, yet the plaintiff appealed from the decision allowing the plea; and afterwards by consent the plea was overruled, and the defendant ordered to answer. See 26 L. T. 304.

[2] See vol. xi. 207–8.

No part of the procedure of the Court of Chancery was copied so closely from that of the civil and canon law as the mode of taking testimony. The only intentional departure was the use of interrogatories instead of articles for the direct examination of witnesses, interrogatories being used in the civil and canon law, only in the cross-examination of witnesses. Yet in making that departure the serious blunder was committed of keeping secret, until the taking of testimony was closed, all the interrogatories upon which witnesses were examined, as well those used on the direct examination as those used on the cross-examination. In the civil and canon law, the testimony of witnesses was kept secret until the taking of testimony was closed, lest the disclosure of the testimony, while there was yet an opportunity to call new witnesses or recall old ones, should lead to perjury and subornation of perjury. In respect, however, to the acts of parties, as distinguished from the acts of witnesses, as the keeping of these secret would tend only to defeat the purposes of justice, the civil and canon law required their immediate and full disclosure. To this, however, there was one exception, namely, the interrogatories upon which witnesses were cross-examined; and the reason of it is obvious: witnesses are supposed to be more friendly to the party who calls them than to the adverse party; and hence it is important that they should testify on cross-examination with as little aid as possible from the party who called them, and with as little opportunity as possible to shape their answers with a view to supporting the testimony which they have given on their direct examination, and each of these objects would be defeated if the interrogatories to be put to witnesses on cross-examination were made public before the cross-examination took place. None of these considerations, however, have any application to the direct examination of witnesses, and while there may be good reasons why a party should not know, until the taking of testimony is closed, what testimony the witnesses of the adverse party have given, there is every reason why he should know what testimony they were expected to give, and, therefore, probably have given. Otherwise, he can neither safely and usefully cross-examine, nor know what counter testimony to procure. And yet, in the Court of Chancery, the rule applicable to cross-interrogatories was applied indiscriminately to all interrogatories for the examination of witnesses, the fact being overlooked that the articles of the civil and canon law, and not the interrogatories of that system, were the true analogue of the direct interrogatories

of the Court of Chancery. The consequence was that, prior to the publication of the testimony, the only information to which a litigant was entitled as to the evidence to be adduced by his adversary was the names and places of residence of his witnesses,[1] and such information as the bill and answer respectively contained. The court, therefore, found it necessary to establish the rule that a plaintiff must in his bill, and a defendant in his answer, indicate not only the facts which he expected to prove, but also, to some extent, the evidence by which he expected to prove them, at the risk of having his evidence excluded, on the ground that it had taken the adverse party by surprise; and hence it frequently became necessary to make statements or charges of evidence, not only in the bill, but in the answer, — not only for the sake of discovery, but lest the adverse party should persuade the court that the evidence had taken him by surprise.

As, however, the rule of secrecy was wholly abolished by the statute in question,[2] the anomaly to which it gave rise might well have been abolished also; and if it had been, and at the same time the union between discovery and pleading had been dissolved, the pleadings in the Court of Chancery would have become precisely what the pleadings in the civil and canon law were, subject to the single qualification that all the plaintiff's pleadings would have been contained in the bill, and all the defendant's in the answer.[3]

Next, let us see what the commissioners actually did for the improvement of the system of pleading in the Court of Chancery, or rather what the legislature did upon their recommendation. By sect. 10 of 15 & 16 Vict., c. 86, it is enacted (1) that every bill shall contain as concisely as may be a narrative of the material facts, matters, and circumstances upon which the plaintiff relies; (2) that

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[1] For greater security the examiner was required to give this information, — not the party calling the witness or his solicitor. Prior to the twenty-fifth Order of April 3, 1828, the examiner was also required to show every witness personally to the adverse party or his representative, in order that the latter might see that the witness was the person whom he purported to be. "Before the witness is examined, he is to be introduced into the Six Clerks' office by the Examiner's clerk, and produced at the seat of the adverse clerk in court, where the Examiner's clerk is to leave a notice in writing of the name and place of residence of every such witness, in order to prevent witnesses from being personated, and to give an opportunity for cross-examination." Harr. Ch. Pr. (ed. of 1808) 261. By the Order just referred to, however, it was provided that in future witnesses should not be produced at the seat of the clerk in court for the adverse party, but that the service there of the notice in writing should continue. See 2 Russ. App. 12.

[2] Sect. 31.

[3] See *supra*, page 163; vol. xi. 207–8.

such narrative shall be divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation; (3) that the bill shall pray specifically for the relief which the plaintiff conceives himself entitled to, and also for general relief; (4) that the bill shall not contain any interrogatories for the examination of the defendant.

It will be seen that the first three clauses are purely affirmative, while the fourth is purely negative. Of the three affirmative clauses, the second alone makes a change; and that change, moreover, while it brings the bill to that extent into conformity with the pleadings of the civil and canon law,[1] affects it only in its superficial and mechanical aspects. The fourth clause abolishes the interrogating part of the bill, but it remains to be seen what is provided in its place. Nothing is said about charges of evidence, and, therefore, they cannot be abolished; and yet it seems pretty clear that their continued existence was not contemplated. Nor could any one guess, from the language of the section, that the "facts, matters, and circumstances," mentioned in the first clause, might constitute a replication as well as an original case.

By sects. 12 and 13 it is enacted that the defendant shall not be required to answer the bill, unless interrogatories are filed by the plaintiff, within a time to be limited by a general order, and a copy thereof delivered to the defendant; but that the defendant shall be entitled to plead, answer, or demur, whether interrogatories be filed or not.

By sect. 14 it is enacted that the answer may contain not only the defendant's answer to said interrogatories, but such statements material to the case as the defendant may think it necessary or advisable to make, and then a clause is added similar to the second clause in sect. 10. This clearly leaves the answer unchanged in substance, though one would scarcely suspect from the language employed that by "such statements material to the case as the defendant may think it necessary or advisable to make," was meant statements constituting either an affirmative defence or an affirmative rejoinder.

Altogether, the enactments contained in these four sections (10, 12, 13, and 14) are truly remarkable. The hopes excited by the fourth clause of sect. 10 are dashed to the ground by the subsequent sections; for we find, first, that the interrogatories, though

[1] See vol. xi. 143–4.

physically separated from the bill, yet constructively are still a part of it; secondly, that while (as before the act) charges of evidence will do the plaintiff no good, yet the absence of them will be as fatal to his right of discovery as ever; thirdly, that there is still but one answer, and that is an answer to the bill, — not to the interrogatories; fourthly, that discovery and defence are still as inseparable as ever, so that, while (as before the act) there may be neither discovery nor defence, or either without the other, yet if there are both, both must be contained in the same document. What, then, was the gain? The division of the pleadings into numbered paragraphs seems to have been about its sum total; and it is difficult to see what other gain the commissioners could have anticipated. What advantage, for example, could they have supposed would accrue from physically separating the interrogatories from the bill, and making them a part of it again by construction? If a plaintiff wished to indicate by his bill whether or not he required from the defendant an answer by way of discovery, there was already a much more simple and a much better way of doing it.[1] It may be added that when a plaintiff, by his bill, pursuant to an authority vested in him, dispenses with an answer from a defendant by way of discovery, such defendant cannot with any propriety either plead or demur to the bill, since by doing either he will be demanding the judgment of the court upon the question whether he shall be required to answer a bill which he has already been released from answering, *i. e.*, upon a question which has no existence, and a decision of which, therefore, either way will be followed by no consequences; and yet it is expressly enacted, sect. 13, that a defendant may plead, answer, or demur to a bill, whether interrogatories are filed or not, *i. e.*, whether he is required to answer the bill or not.

Upon the whole, it is impossible to say much for the labors of the commission, so far as they related to the system of pleading in the Court of Chancery; and yet of the six equity lawyers on the commission, two afterwards became Lords Chancellors, another Master of the Rolls, two others Lords Justices, and the remaining one a Vice-Chancellor. It ought, however, in justice, to be said that the attention of the commission was chiefly occupied with other things.

It remains to consider briefly two changes made by the same

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[1] See *supra*, pages 161–2.

statute respecting the enforcement of discovery, namely, by giving defendants a new method (in addition to the old one) of compelling discovery by plaintiffs, and by giving to both plaintiffs and defendants a new method (in addition to the old one) of compelling the discovery and production of documents by the other.

Prior to the statute, as has been seen,[1] the only method by which a defendant could compel a plaintiff to give discovery was by serving upon him a writ of *subpœna*, and the only way of obtaining a writ of *subpœna* was by filing a bill. In the nature of things, however, neither a writ of *subpœna* nor a bill was necessary, and therefore each of them caused an unnecessary expense, and some unnecessary delay; but these seem to have been the only objections to them. There was no reason, in the case of any bill for discovery, why the interrogatories should be separated from the bill; for, as the bill would be filed for the sake of discovery only, there could not be any question whether the plaintiff would wish to file interrogatories or not. Nor could it be material whether the defendant's answer was to the bill or to interrogatories separated from the bill, as the answer could in no event contain anything but discovery, and so there could be no question of separating discovery from defence. The only thing needed, therefore, was that a defendant should be enabled to interrogate a plaintiff directly upon the allegations in the answer constituting the defence to the bill.

Accordingly, it was enacted by sect. 19 that any defendant might, after sufficiently answering the bill, and without filing any bill for discovery, file interrogatories for the examination of the plaintiff, and deliver a copy thereof to the plaintiff, and that the plaintiff should answer the same as if contained in a bill for discovery. The words "after sufficiently answering the bill" were introduced to preserve a rule which had always existed, namely, that a defendant must give discovery to the plaintiff before receiving discovery from him. The section, however, contains another clause (which shows to how great an extent the commissioners were under the domination of old ideas), namely, to the effect that there should be prefixed to the interrogatories a concise statement of the several subjects upon which discovery was sought. This evidently proceeded upon the idea that, if a bill was not to be filed, a substitute for it must be provided.

In respect to the discovery and production of documents, the

[1] See vol. xi. 216.

reader is reminded that, prior to the statute in question, the discovery of documents was effected in the same manner as any other discovery, while their production was effected by an order made upon motion. Moreover, as an order for production had to specify and describe the documents to be produced, and as it had to be founded exclusively on the admissions in the defendant's answer, it followed that the discovery had to be completed before the first step towards production could be taken. Production, therefore, in general, involved in it no element of discovery; but this was not absolutely true; for it was sometimes impracticable to fix by the order for production the precise limits of the production to be made, and when the precise limits were not fixed by the order, it was necessary that the production should be accompanied by an affidavit showing that the terms of the order were complied with.[1]

What, then, was the change made by the statute? Before answering that question, it is necessary to advert to a species of discovery heretofore only incidentally alluded to,[2] namely, discovery made after the hearing of the cause. The discovery hitherto considered, including the production of documents, is always made before the hearing of the cause, and even before the taking of testimony. In theory, moreover, the discovery which may be thus obtained is all that is needed; for, though it is supposed to be obtained primarily for the purposes of the hearing, yet it may be used for all the purposes of the suit, whether at, or before, or after the hearing; nor can a party refuse to give any particular discovery merely because it will not be needed until after the hearing. Nevertheless, as suits in equity are, comparatively speaking, very complicated, and as they are seldom finally disposed of at the hearing (*i. e.*, at the first hearing), and as the most important part of the litigation frequently takes place after the hearing, it is often found difficult, and even impracticable, for a party to anticipate, before the hearing, all the questions which may arise in the progress of the suit, and before its final termination; and hence it was found to be conducive to justice to permit parties to provide themselves with evidence as the occasion for it arose; and, indeed, the reasons for this indulgence were found to be so strong that a rule, founded upon the highest considerations of policy, was not permitted to stand in its way, namely, the rule that no witnesses

[1] See vol. xi. 212–13.

[2] See vol. xi. 211.

shall be examined after the testimony is published;[1] and, accordingly, if new testimony was found to be necessary upon questions which arose after the hearing, it was permitted to be taken. *A fortiori*, therefore, if new discovery was needed under similar circumstances, the court enabled the parties respectively to obtain it, no similar rule of policy standing in the way.

It may be added that, when new evidence was needed after the hearing, it was in the Master's office that the occasion for it arose, as it was there that all questions of fact arising after the hearing were, in the first instance, investigated; and it was, therefore, found convenient to arm the Master with power to enforce new discovery. Accordingly, whenever a cause was referred to the Master for a purpose which might involve a trial of questions of fact, the decree (by which the reference was directed) ordered that, "for the better discovery of the matters aforesaid," the parties respectively were to produce before said Master upon oath all deeds, books, papers, and writings in their custody or power relating thereto, and were to be examined upon interrogatories as said Master should direct.[2] Here, it will be seen, the distinction between discovery and production, *i. e.*, between admissions by parties of facts within their knowledge, and the production by them of documents in their custody or power, is fully preserved. Whether the relative place assigned in the decree to the direction as to the production of documents was meant to indicate that such production should take place before the examination on interrogatories, may not be clear. Certain it is, however, that the former was relatively of much greater importance in the Master's office than at the hearing of the cause. Moreover, the words "produce before said Master upon oath" import that the production is always to be accompanied by an affidavit; and, therefore, economy suggests that such affidavit should be made to serve the purpose which, in the case of documents produced before the hearing, was served by the answer to the bill, especially as an affidavit is quite as convenient for such a purpose as an answer to a general charge or a general interrogatory as to documents. The important part of either is the negative part, *i. e.*, that in which the party swears either that he has no relevant documents, or none except those which he specifies; and, in the case of either, the terms in which this part is expressed must be prescribed. In the case of an answer they are prescribed

[1] See *supra*, pages 163–5; vol. xi. 144.

[2] Seton on Decrees (1st ed.), 11.

by the charge of documents, and the interrogatory as to documents contained in the bill. In the case of an affidavit they must be prescribed directly by the same authority as that by which the production is ordered; and, as they should be the same in all cases, they may be prescribed once for all by fixing the form of the negative part of the affidavit to be made by every one who is ordered to produce documents. Nor has an answer any advantage over an affidavit in respect to the affirmative part, *i. e.*, the part in which the possession of certain documents is admitted, and the documents are scheduled and described; for, in case of either an answer or an affidavit, the party making it must at his peril see that it is sufficient, *i. e.*, if it is not sufficient, he must make a further answer or affidavit, and also pay costs. Moreover, an affidavit made at the time of production has this advantage over an answer made before production, namely, that the former will always serve every purpose that can be served by the latter, while the converse, as has been seen, is not always true.[1]

Accordingly, in the Master's office the common course was for the Master to direct a production of documents by all parties with the usual affidavit, before any interrogatories were brought in. It might happen, however, when the production was made, that the adverse party was not satisfied with it, because he believed that the affidavit which accompanied it, though sufficient upon its face, was either false or failed to disclose the whole truth, and therefore he wished further to probe the conscience of the party making the affidavit; and, in that case, his course was to bring in interrogatories for the latter to answer. These interrogatories would of course be special, being suggested by and adapted to the special circumstances of the case. It will be seen, therefore, that whenever, before the hearing, for the purpose of obtaining further discovery as to documents than is afforded by the answer to the original bill, the plaintiff would amend his bill by inserting a special charge and a special interrogatory as to documents, he should, after the hearing, for the purpose of obtaining further discovery as to documents than is afforded by the usual affidavit, bring into the Master's office special interrogatories as to documents. And it ought to be clearly understood that, while an affidavit as to documents may well supersede an answer to a general charge or general interrogatory as to documents, it cannot at all supersede an answer to a special charge, or to special interroga-

[1] See *supra*, page 169.

tories, whether contained in an original or an amended bill, or, in case of interrogatories, whether contained in a bill or brought into the Master's office.

Such, then, having been the practice before the statute respecting the discovery and production of documents, both before and after the hearing, what changes did the statute make? By sect. 18 it is enacted that the court may, on the plaintiff's application, make an order for the production by any defendant upon oath of such of the documents in his possession or power, relating to the matters in question in the suit, as the court shall think right; and, by sect. 20, a similar provision is made for production by the plaintiff on the application of a defendant. If these sections be read in the light merely of the previous practice as to production before the hearing, their meaning will be found to be obscure and uncertain, but if they be read in the light of the previous practice as to production after the hearing, their meaning becomes clear; for they employ the very terms which decrees had rendered so familiar. Their effect, therefore, was that, of the two methods which had previously been employed for enforcing the discovery and production of documents, namely, one before and one after the hearing, the latter should be available before the hearing as well as after it, so that there should be, before the hearing, a choice of either method. There was, however, one thing lacking to make the new method prescribed by the statute complete, for no provision was made for filing interrogatories; and, therefore, the new or statutory method was left to be supplemented by the old method, so far as regarded the use of interrogatories, *i. e.*, if a party, seeking production under the new method, was not satisfied with the discovery afforded by the affidavit which accompanied the production, he was left to seek further discovery by answer to interrogatories filed under sect. 12 or sect. 19 (as the case might be). And if the interrogatories so filed, and the answers to them, had been made entirely independent of the pleadings, as they might have been made available for every purpose which interrogatories could serve, any further provision for filing interrogatories would have been superfluous; but as the interrogatories authorized to be filed by sect. 12 were made a part of the bill, and as the answers to them must be contained in the answer to the bill, they were not at all adapted to the needs of the new method of enforcing the discovery and production of documents; and it seems, therefore, to have been a misfortune that sects. 18 and 20 did not contain a provision for filing interroga-

tories; for the want of proper facilities for supplementing the discovery obtained by affidavit under those sections was much felt.

Unfortunately, also, the judges upon whom devolved the duty of enforcing the discovery and production of documents under sects. 18 and 20, namely, the Master of the Rolls and the three Vice-Chancellors, did not fully adopt the view which has just been suggested as to the interpretation of those sections. They seem to have supposed that the separation of the discovery from the production, which existed under the old method, must be preserved under the new, and yet they were not prepared to accept the natural consequence of that view, namely, that there must be a separate proceeding for each; and accordingly they decided [1] that discovery and production should be obtained under one order, but that that order should be executed piecemeal, *i. e.*, that discovery should first be made within a time named, and then that production should be made within a further time named. Clearly the statute did not contemplate such an order, and it is not perceived that it could be attended with the smallest advantage over an order directing both to be made at the same time; and it was certainly attended with one serious disadvantage, namely, that it would frequently necessitate the making of a second affidavit at the time of the production.[2]

The method of obtaining orders for the discovery and production of documents, under sects. 18 and 20, or for production under the old method, received a modification from another important statute,[3] passed pursuant to the recommendations of the same commissioners, and which came into operation at the same time as the principal act. Its main object was to abolish the office of Master in Chancery, and to transfer the business transacted by the Masters to the chambers of the Master of the Rolls and the three Vice-Chancellors respectively; but an incidental object was to introduce into the Court of Chancery the common-law distinction between judicial business done in court and that done by a judge out of court, *i. e.*, at the judge's chambers; and, as the distinction itself was borrowed from the common-law courts, so also the mode of proceeding at chambers, namely, by summons and order, was bor-

[1] The decision was made by fixing and announcing the form of order to be made on an application for discovery and production of documents. On the same occasion the judges announced a form of affidavit which would be deemed a compliance with such an order. See *Ordines Cancellariæ*, 530; Rochdale Canal Co. *v.* King, 15 Beav. 11.

[2] See *supra*, page 169.

[3] 15 & 16 Vict., c 80.

rowed from them. Among the items of business also which the statute [1] authorized, at the option of the judges, to be done at chambers, were applications for the discovery or production of documents; and accordingly, a few days after the act went into operation, namely, Nov. 10, 1852, the Master of the Rolls and the three Vice-Chancellors respectively announced [2] that all such applications must be made at chambers. Consequently, every order for discovery and production under sects. 18 and 20, or for production under the old method, subsequently to Nov. 10, 1852, was obtained by means of a summons issued by the judge to whose court the cause was attached at his chambers, and served upon the adverse party, whereas, previous to the statute in question, all orders of every description had to be obtained by motion in open court. One object in making this change appears to have been to save expense by getting rid of the necessity of employing counsel. This, however, was more a seeming than a real advantage; for the reason why it is not necessary to employ counsel at chambers is that business done there is not supposed to require an argument; and whenever there is to be an argument, counsel must be employed, whether it be in court or in chambers. Moreover, whatever may be the merit, on the score of economy, of a summons from chambers as compared with a motion in open court, nothing can be said on that score for the method introduced by sects. 18 and 20 of ch. 86, as compared with the old method; for the latter did not involve the necessity of making any application to the court, unless there was a contest, and so an argument was required. Indeed, discovery never involved an application to the court, unless exceptions were taken to the answer for insufficiency, and were not submitted to by the defendant; nor did production, unless the defendant refused to produce some of the discovered documents, and the plaintiff insisted upon their production. Under sects. 18 and 20, on the other hand, both discovery and production always had to be obtained under an order, whether there was any contest or not; and though it has been said [3] that both were obtained under one order, yet that was only when there was no contest in regard to either, *i. e.*, when the usual affidavit made by the one party, and the production or non-production by him in accordance with it, were acquiesced in by the other party: and in regard to production in particular, the order only required the production of such docu-

[1] Sect. 26.

[2] For the announcement made by Turner, V. C., see 9 Hare, Appendix, 48, 49.

[3] *Supra*, page 173.

ments as the party by his affidavit did not object to producing. As to all others, therefore, a special application had to be made, and of course it involved the employment of counsel on both sides. It would seem, moreover, that discovery and production of documents under sects. 18 and 20, unmodified by ch. 80, would have been more rather than less expensive than under the old method, — more expensive also than it need have been. It is not obvious, for example, why the order just referred to was supposed to be necessary. As the discovery and production which it secured were only such as the party obtaining the order had an absolute right to, a notice from him to the adverse party that he required such discovery and production would seem to have been all that was needed.

By the third order of June 1, 1854,[1] it was provided that the course of proceeding in use as to the production of documents ordered to be produced before the hearing of a cause shall extend and be applicable to the production of documents ordered to be produced after the hearing.

What changes did this rule make in the method of obtaining production of documents after the hearing of a cause? First, it required the affidavit of documents to precede their production instead of being contemporaneous with it; secondly, it took away the right to supplement, by means of interrogatories, the discovery obtained by the affidavit. Both of these changes, moreover, were for the worse. As to the second, this is emphatically true; for, while the rule professed to place production after the hearing on the same footing with production before the hearing, in fact it placed it upon a much worse footing, as it was not possible for a party after the hearing, to supplement by answer the discovery obtained by affidavit, and, therefore, the right to file interrogatories being taken away, it was not possible to supplement it at all.

It would seem, therefore, that the rule of June 1, 1854, ought to have been precisely the reverse of what it was, *i. e.*, that it ought to have provided that the method in use of obtaining the production of documents after the hearing should extend and be applicable to production before the hearing. The rule would then have accomplished two important objects, for it would have supplied the omission, in sects. 18 and 20, of authority to file interrogatories, and it would have put upon those sections their true interpretation as to the relative time of making the affidavit of documents.

C. C. Langdell.

[1] See 18 Jur. Part II., p. 199.